**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DANIEL IVAN KELLEY** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | Docket Nos. **1,053,797 &** |
| | ) | **1,053,798** |
| **GOODYEAR TIRE & RUBBER CO.** | ) | |
| Self-Insured Respondent | ) | |

## ORDER

The self-insured respondent requests review of the July 23, 2012 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on November 16, 2012.

### APPEARANCES

Richard Billings of Topeka, Kansas, appeared for the claimant. John Bausch of Topeka, Kansas, appeared for the self-insured respondent.

### RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

### ISSUES

The ALJ found claimant sustained a 19% whole body functional impairment and a 45.5% work disability based upon a 43% wage loss and a 48% task loss.

Respondent maintains the ALJ erred in determining the nature and extent of claimant's disability, claimant's entitlement to unauthorized medical compensation, and claimant's right to receive future medical compensation. Respondent argues claimant did not sustain any task loss because he testified he was able to perform his work at Goodyear and his subsequent job at Del Monte.

Claimant takes the position the award should be modified to find a 49% work disability based on a 43% wage loss and a 55% task loss. Claimant contends in the alternative that the ALJ's Award should be affirmed.

The Board must accordingly review whether the ALJ committed error in his findings on these issues:

(1) unauthorized medical compensation;

(2) future medical compensation; and,

(3) the nature and extent of claimant's disability, both functional and work disability.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Daniel Kelley was 35 years old when he testified at the April 3, 2012 regular hearing. He commenced employment with respondent on July 12, 2010. Claimant testified he initially injured his back on October 31, 2010, when he was pulling on some rubber while lunging forward and heard his back pop. Claimant continued working until he was hospitalized in November 2010 due to a second accidental injury. Claimant described his second accident, which occurred on November 26, 2010, as follows:

> Well, that one the only thing that I did was I squatted down and I went to push a roll on my forklift and my body locked up and I just couldn't move no more.
>
> . . .
>
> It -- like nerve pain running all the way down my legs, up -- up my back. I just couldn't move.[1]

Claimant testified he experienced "very severe"[2] pain after the second accident.

The claims for the first and second accidents were separately docketed, but were thereafter consolidated by the ALJ into one claim with a date of accident of November 26, 2010. The compensability of consolidated claim was admitted.[3]

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[1] R.H. Trans. at 5-6.

[2] *Id.* at 7.

[3] *Id.* at 3.

Claimant was paid temporary total disability compensation from November 30, 2010 through March 11, 2011, although claimant testified he returned to regular duty in late January 2011. Claimant continued to work for respondent until September 2011. He experienced some difficulty doing his job but he was able to successfully perform all of his duties. He last worked for respondent on approximately September 25, 2011. Claimant testified at the regular hearing that his employment with respondent had not been terminated, but respondent had no accommodated work for him to perform.

Claimant did not work from September 25, 2011, until he started working for Focus on approximately February 1, 2012. Claimant testified he had been working for a period of two to three months for Focus, apparently a temporary job service, which placed claimant at a facility operated by Del Monte.

Claimant received nonsurgical treatment from a number of medical providers. The treatment included injections from Dr. Nicolae; physical therapy; massage therapy; chiropractic adjustments; an FCE; and a consultation with Dr. Glenn Amundson, an orthopedic surgeon. One of claimant's physicians, Dr. San Diego, provided claimant with permanent physical restrictions, presumably after the FCE was administered. Claimant admitted his symptoms do not prevent him from doing any physical activity, including the duties required by his jobs at Goodyear and Focus/Del Monte.[4]

At some point Dr. San Diego lifted the restrictions at claimant's request. Claimant testified he continued to experience pain in his middle and lower back and pain in his lower extremities.

Dr. Daniel Zimmerman, a board certified independent medical examiner, evaluated claimant on October 19, 2011, at the request of claimant's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. X-rays of claimant's lumbar spine were performed in Dr. Zimmerman's office. The lateral view showed disk space narrowing at L5-S1 and the posterior anterior view revealed normal vertebral alignment. Dr. Zimmerman diagnosed lumbar disk disease at L4-5 and L5-S1 which was causally related to claimant's work injury. Dr. Zimmerman imposed permanent restrictions of no lifting greater than 20 pounds occasionally and 10 pounds frequently; no frequent flexing of the lumbosacral spine; and no frequent bending, stooping, squatting, crawling, kneeling and twisting activities at the lumbar level.

[4] *Id.* at 25, 34-35.

Dr. Zimmerman determined claimant had reached maximum medical improvement. Due to claimant's lumbar disk disease at L4-5 and L5-S1, Dr. Zimmerman provided a rating of 19% whole body functional impairment based on the AMA *Guides.*[5]

Dr. Zimmerman reviewed the list of work tasks prepared by vocational consultant Dick Santner which identified the work tasks claimant performed in the 15 years prior to the accidental injury. Dr. Zimmerman opined claimant could no longer perform 21 of the 43 tasks[6] for a 48% task loss.[7]

K.S.A. 44-510e(a) provides in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Neither party takes issue with the ALJ's finding of a 43% wage loss. The ALJ's finding of a 19% permanent functional impairment is based on the undisputed testimony of Dr. Zimmerman. Likewise, the only vocational testimony identifying the work tasks claimant performed in the 15-year period preceding the injury came from Mr. Santner. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[8]

The only task loss testimony contained in the record is that of Dr. Zimmerman and respondent does not contend otherwise. Respondent argues the evidence does not support a finding of any task loss because claimant testified he was able to perform his work at respondent and with his current employer and that his back and leg pain did not limit his ability to perform any physical activity.

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[5] American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[6] Zimmerman Depo. at 9-12.

[7] As noted in Judge Avery's award, there is inconsistency between the task loss to which Dr. Zimmerman testified (48%) and the task loss opinion expressed in his narrative report (55%). The ALJ properly resolved the discrepancy "in favor of the individual tasks Dr. Zimmerman specifically testified claimant was unable to perform." ALJ Award (July 23, 2012) at 3.

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

The fallacy in respondent's argument is that K.S.A. 44-510e(a) clearly establishes the proof necessary to establish task loss: a physician's opinion that the injured worker has lost the ability to perform a calculated percentage of the work tasks that the worker formerly performed in the 15 years before the accident.[9] Obviously, claimant is not a physician and his opinion of what work tasks he can and cannot perform is not competent evidence to overcome the undisputed opinion of Dr. Zimmerman regarding claimant's task loss. The statute's use of the term "physician" is clear and unambiguous. When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. It is not appropriate to speculate on legislative intent or to read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[10]

Respondent provides neither argument nor authority to support its position that the ALJ erred in his findings regarding unauthorized and future medical compensation and regarding claimant's permanent functional impairment. The ALJ's findings on those issues are adopted by the Board.

The Board therefore finds claimant satisfied his burden of proving he sustained a work disability of 45.5%, consisting of an average of claimant's a loss of ability to perform 48% of the work tasks he performed during the 15-year period before his accident and claimant's 43% wage loss. Claimant is entitled to permanent partial disability benefits based a 45.5% work disability. The ALJ's findings regarding functional impairment, unauthorized medical, and future medical compensation are fully supported by a preponderance of the credible evidence and are hereby adopted by the Board.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[11] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE**, the Board finds that the Award of ALJ Brad E. Avery dated July 23, 2012, is hereby affirmed in all respects.

**IT IS SO ORDERED.**

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[9] *Gustin v. Payless Shoesource*, 46 Kan. App. 2d 87, 257 P.3d 1277 (2011).

[10] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[11] K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of January, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

e: Richard Billings, Attorney for Claimant,
richardpbillings@yahoo.com
John Bausch, Attorney for Respondent and its Insurance Carrier,
jbausch@goodellstrattonlaw.com
Brad E. Avery, Administrative Law Judge